No. 16,277

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD BUTLER and DONALD CAHEE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Appellants were charged in a three-count indictment returned May 29, 1958 by the Grand Jury of the Northern District of California. The first count charged appellant Edward Butler with transferring marijuana without a written order in violation of Title 26 U.S.C. Section 4742. The second count charged Edward Butler with concealment of marijuana in violation of Title 21 U.S.C. Section 176 (a). The third count charged appellant Donald Cahee with concealment of marijuana in violation of Title 26 U.S.C. Section 4744. Motions for Suppression of Evidence and for a Severance were made on June 12, 1958 by the appellant Edward Butler and on June 16,

1958 appellant Donald Cahee also moved to suppress evidence. A hearing was held before the Honorable George B. Harris, United States District Judge, wherein all motions of the appellants were denied. Appellants waived jury trial and were tried before the Honorable Michael J. Roche. On October 14, 1958 appellant Edward Butler was convicted on Count II, and appellant Donald Cahee was convicted on Count III. Since both appellants were second offenders, Edward Butler was sentenced to ten years' imprisonment and Donald Cahee was sentenced to five years' imprisonment.

On October 23, 1958, appellants filed timely notice of appeal. On November 19, 1958, an order was entered by United States Circuit Judge Albert Lee Stephens permitting the appeal *in forma pauperis.*

Jurisdiction of this court over the appeal is conferred by Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE.

On May 27, 1958 Ira Feldman, a Federal Narcotics Agent, learned from an informer that appellant Edward Butler was dealing in marijuana and that this informer, one William James, had seen some marijuana in Edward Butler's apartment at about 6:30 that evening. At 9:00 P.M., a group of narcotic agents led by Agent Feldman knocked at the door and when Edward Butler opened it, placed him under arrest. Appellant Donald Cahee was sitting in the apartment when the agents entered. Agent Ira Feldman

asked him if he was "clean". Donald Cahee replied that he was not, that he had marijuana in his possession which he had just bought from appellant Edward Butler. Incident to the arrest of Edward Butler in the apartment, the agents searched the apartment and discovered on a kitchen table, a quantity of marijuana. William James, the informer, was not produced as a witness by the government, nor was he produced by the defense.

QUESTIONS PRESENTED.

1. Was the evidence on Count II sufficient to convict?

2. Was there an illegal search and seizure?

ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT EDWARD BUTLER.

Appellant Edward Butler argues that, first, the case of *Caudillo v. United States,* 253 F. 2d 513, directly on this point, is distinguishable because the marijuana involved there was unmanicured (that is, with stems and leaves present) whereas here the record fails to show that. Second, in any event, that *Caudillo v. United States,* decided by this circuit, is wrong.

As to the first point, the appellant is in error because the marijuana at issue here was also unmani-

cured as is shown by Exhibits I, II, III, V, and VII, which are as much a part of the record as the typewritten statements in court. The judge examined these exhibits before rendering his verdict and he could see, as can this court, that the marijuana was unmanicured. Appellant then is forced to rely on the chance of this court's overruling the *Caudillo* decision.

We believe it would be presumptuous of the government to argue that a case decided so recently after such full consideration is correct. In any event, no court has disagreed with the opinion and it is a law in this circuit. Should any argument be necessary on merits of the *Caudillo* case, we believe that the well-reasoned opinion by Judge Barnes in that case states the law far better that the government could in its brief, and we, therefore, incorporate that by reference.

It furthermore appears that this issue was never raised before the trial court. Had it been, it is possible that the court might have made more detailed findings or that the government would have produced more evidence. For this reason it would appear that this court is without jurisdiction to decide this issue.

II. THERE WAS NO ILLEGAL SEARCH AND SEIZURE.

Appellant's second point is that the search and seizure was illegal and, therefore, that evidence was wrongly admitted at the trial. In order for the court to uphold this argument, it would have been to rule

that a recent Supreme Court decision, *Draper v. United States* (1959) 79 S. Ct. 329, is wrong. The appellant argues that this case is distinguishable from *Draper v. United States* because in *Draper,* the informant was shown to be dead, whereas in this case, the informant was merely unavailable and not produced by either the government or the defense.

Nowhere, however, is the distinction hinted at in the *Draper* opinion and, indeed, the opinion appears to imply that, even if the informant were available, it would not be necessary to use him. In *Draper* the court merely held that hearsay information could be sufficient to constitute probable cause, and more particularly, "reasonable grounds" within the meaning of Section 104 (a) of the Narcotic Control Act of 1956.

Here there is no contention that the amount of information received by Agent Feldman was insufficient, but merely that it was hearsay. It should be noted that the question of whether the hearsay was sufficient to constitute "reasonable grounds" is entirely independent of the question of whether the information presented to the agent was, in fact, correct. The agent, himself, testified to the circumstances surrounding his receipt of information and any evidence on that fact given by the informant would be merely cumulative. On the other hand, although the foundation for this hearsay could be testifed to by the informant, it is irrelevant to the question of "reasonable grounds". Accordingly, since the appellant has not complained that the actual information received from the informant was insufficient to constitute

probable cause, his only defense on this point can be the non-prejudicial failure to produce the informant. Therefore, this point is not well taken.

Accordingly, the judgment should be affirmed.

Dated, San Francisco, California,
July 21, 1957.

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